Supreme Court, U.S.
FILED
JUN 17 1991
OFFICE OF THE CLERK

91-110

CASE NO.:

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

HERBERT W. FIELDS, JR.
Petitioner

v.

HARTFORD CASUALTY
INSURANCE COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael J. Pledger
c/o Pledger & Pledger
3120 Southwest Freeway
Suite 618
Houston, Texas 77098
(713) 526-1639
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether the lower court erred in determining a bankruptcy claim to be nondischargeable in favor of Respondent, Hartford Casualty Insurance Company by its being subrogated under state law to the claim of the State of Texas for taxes which Respondent paid as a surety under a bond contract with Petitioner, thereby upholding the state doctrine of subrogation over the provisions of the United States Bankruptcy Code, and the Constitution of the United States. The split of authority among three circuit courts of appeals has dictated the necessity to bring this issue before this court for final resolution.

LIST OF ALL PARTIES

I certify that the following comprise all interested persons known to Petitioner:

Herbert W. Fields, Jr., Petitioner
Attorney: Michael J. Pledger
Pledger & Pledger
Houston, Texas

Hartford Casualty Insurance Company, Respondent
Attorney: Gary Wickert
Hughes, Watters and Askanase
Houston, Texas

Michael J. Pledger

MICHAEL J. PLEDGER
Attorney for Petitioner

TABLE OF CONTENTS

Questions Presented For Review	p. 1
List Of All Interested Parties	p. 2
Table Of Contents/Table Of Authorities	p. 3
Official Court Opinions	p. 5
Statement Of Jurisdiction	p. 6
Constitutional Provisions & Statutes	p. 7
Statement Of The Case	p. 9
Argument	p. 13
Conclusion	p. 25
Appendix	p. 27

TABLE OF AUTHORITIES

CASES

In re Alloway	p. 19,20
In re Beaman	p. 24
First National Bank v Ackerman	p. 17
Gilbert v. United States Fidelity & Guaranty Company	p. 20
In re Morris	p. 19

National Collection Agency vs. Trahan p. 13,16 19,21,23

In re Smothers p. 19,21

Western Surety Co. v. Waite (In re Waite) p. 13

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

U.S. CONST. Art. I, Section 8, cl. 4. p. 16

U.S. CONST. Art. VI, Section 2. p. 23

11 U.S.C. Section 523(a)(1)(A) p. 14,15 16,17

11 U.S.C. Section 507(a)(7) p. 14

Texas Business and Commerce Code Section 34.04 p. 17

Bankruptcy Rule 4007 p. 12

LEGISLATIVE MATERIALS

House Report No. 95-595, 95th Cong. 1st Sess. 363 (1977) p. 17-18

Senate Report No. 95-989, 95th Cong. 2d Sess. (1978) p. 18

OFFICIAL COURT OPINIONS

The United States Bankruptcy Court for the Southern District of Texas issued its Memorandum Opinion and Order signed March 15, 1989, determining Hartford's claim to be nondischargeable.

The United States District Court for the Southern District of Texas affirmed the decision on July 12, 1990, and the Fifth Circuit Court of Appeals also affirmed the decision on March 21, 1991.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari is sought from a final order of the United States Court of Appeals, Fifth Circuit, issued March 21, 1991, and is herein filed within the required ninety (90) day period.

This court has jurisdiction pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. Art. I, Section 8, cl. 4.

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform througout the United States;

(4) To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;"

U.S. CONST. Art. VI, Section 2.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

Judges in every State shall be be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

11 U.S.C. Section 523(a)(1)(A)

"A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt -

(1) for a tax or a customs duty -

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;"

11 U.S.C. Section 507(a)(7)

"The following expenses and claims have priority in the following order:

...(7) Seventh, allowed unsecured claims of governmental units; only to the extent that such claims are for -"

STATEMENT OF THE CASE

This is an appeal from a final order signed by the Fifth Circuit Court of Appeals on March 21, 1991 affirming the decision of the Bankruptcy Court and District Court in determining the claim of Hartford Casualty Insurance Company to be nondischargeable.

FACTS

The Petitioner, Herbert W. Fields, Jr. (Fields) filed his Chapter 11 case on December 28, 1984, and properly scheduled Hartford Casualty Insurance Company (Hartford) as a creditor.

Hartford issued a surety bond covering a mixed beverage permit to Fields as the owner of corporations known as Corky's Country and Carlos' 'N Charlies Del Norte, Inc. The surety agreement bound Fields as principal and Hartford as

surety to the rights of the State of Texas for payment of all fees, taxes and penalties levied by the Texas Alcoholic Beverage Commission. Fields filed a Chapter 11 bankruptcy petition on December 28, 1984. During the periods of December 28, 1984 to October 16, 1985 and February 19, 1985 to October 2, 1985, Fields failed to pay taxes covered by the surety bonds. Pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State on November 21, 1985. This case was converted to a Chapter 7 case on October 29, 1986.

The Chapter 7 Creditors' Meeting was noticed and held on December 16, 1986, and the deadline for filing complaints to determine dischargeability under 11 U.S.C. 523(c) was established as February 16, 1987.

Hartford filed a Complaint to

Determine Dischargeability of Debt on February 9, 1988, nearly one year after the bar date.

Petitioner filed his Motion to Dismiss Complaint on March 9, 1988, and accompanying Memorandum of Law.

The Bankruptcy Court issued its Memorandum Opinion and Order signed March 15, 1989 determining the claim of Hartford Casualty Insurance Company to be nondischargeable under 11 U.S.C. Section 523(a)(1)(A).

The Petitioner brought an appeal from that order on the grounds that the debt was not automatically non-dischargeable as taxes pursuant to 11 U.S.C. 523 (a)(1)(A), and that under any other theory said complaint was not timely filed. The Petitioner asserted that any debt which was owing to Respondent, Hartford, was on account of a contractual relationship by

way of indemnity agreements, and is therefore not for taxes and not automatically nondischargeable as taxes, and is therefore subject to the time limitations of Bankruptcy Rule 4007 if nondischargeability is sought under an alternate theory. The District Court issued its Order signed July 12, 1990 affirming the Bankruptcy Court's decision and the Fifth Circuit Court of Appeals affirmed by Order dated March 21, 1991.

ARGUMENT

Petitioner respectfully requests that this court grant a Writ of Certiorari in this case in order to resolve a split in authority among three (3) circuit courts of appeals. The Eleventh Circuit Court of Appeals has decided a case similar to the instant case and found that debt to be nondischargeable on the same basis as the Fifth Circuit in the instant case. Western Surety Co. v. Waite (In re Waite), 698 F.2d 1177 (11th Cir. 1983).

The Ninth Circuit Court of Appeals has held exactly the opposite, that federal bankruptcy law controls and that the debt is dischargeable unless it is owed to the taxing authority itself and cannot be held nondischargeable to another party on a state law subrogation theory. National Collection Agency, Inc. vs.

Trahan, 624 F.2d 906 (9th Cir. 1980).

Therefore, not only does this case present the issue of whether federal bankruptcy law or state law is the controlling authority in United States Bankruptcy Court, but also gives this court the opportunity to settle this issue of federal bankruptcy law in a manner which will make the law consistent throughout the United States.

Section 523(a)(1)(A) of the Bankruptcy Code reads as follows:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> (1) for a tax or a customs duty--
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

The type of taxes in question here are then found to be of a nondischargeable nature by referring to Section 507(a)(7).

Respondent is a creditor of the Petitioner by virtue of two (2) surety bonds issued by Respondent in favor of the State of Texas on which they now claim to have paid $15,479.58. Said payments were made on account of taxes, penalties, and other fees levied by the Texas Alcoholic Beverage Commission in regard to a mixed beverage permit held by Petitioner's corporations. Respondent is a private corporation and is in no way a government entity. Respondent, therefore, has no right to levy taxes of any kind nor would any debt owed to Respondent be nondischargeable pursuant to Section 523(a)(1)(A) of the Bankruptcy Code. This type of contract entered into by Hartford and Fields is in the ordinary course of business of Hartford and no doubt the fees it charges for such a service are geared to cover all losses which may be incurred

through this type of bond and still ensure a profit.

Hartford now claims to hold the same nondischargeable status pursuant to 11 U.S.C. Section 523(a)(1)(A) as a government entity due to its claimed status as a subrogee under state law. However, any state law contrary to federal bankruptcy law must yield. National Collection Agency, Inc. vs. Trahan, supra.

The right to regulate bankruptcy law has been specifically granted to the federal government. U.S. CONST. Art I, Section 8, cl. 4. Any attempt by a state to circumvent that grant and exercise of authority by Congress through the Bankruptcy Code must not be allowed. The doctrine of subrogation is said to be only a "legal fiction" by force of which an obligation, extinguished by payment by a third party, is treated as still existing

for benefit of that third party. First National Bank v Ackerman (1888), 70 Tex 315, 8 SW 45. Elements of that doctrine have been codified by the State of Texas. Texas Business and Commerce Code Section 34.04. To allow a state to define "taxes" to include the obligation of a private for-profit corporation in derogation of the clear meaning and intent of Section 523(a)(1)(A) of the Bankruptcy Code, is to frustrate the intent of Congress to protect tax revenues to governmental bodies, and to impermissably delegate a federal constitutionally mandated power to the states. The intent of Congress at the time of enactment to protect taxes (rather than subrogees to claims for taxes) is clearly shown in the legislative history.

"Subsection (a) lists eight (ten as amended by Pub. L. No. 98-353) debts excepted from discharge. Taxes that are entitled to priority are excepted from discharge under paragraph (1). In

addition, taxes with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat, or with respect to which a return (if required) was not filed or was not filed after the due date and after one year before the bankruptcy case are excepted from discharge. If the taxing authority's claim has been disallowed, then it would be barred by the more modern rules of collateral estoppel from reasserting the claim against the debtor after the case was closed. See Plumb, The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures, 88 Harv. L. Rev. 1360, 1388 (1975)" House Report No. 95-595, 95th Cong. 1st Sess. 363 (1977)

"Subsection (a) lists nine kinds of debts excepted from discharge. Taxes that are excepted from discharge are set forth in paragraph (1). These include claims against the debtor which receive priority in the second, third and sixth categories (sec. 507(a)(3)(B) and (C) and (6). These categories include taxes for which the tax authority failed to file a claim against the estate or filed its claim late. Whether or not the taxing authority's claim is secured will also not affect the claim's nondischargeability if the tax liability in question is otherwise entitled to priority." Senate Report No. 95-989, 95th Cong. 2d Sess (1978)

The legislative history speaks only of claims by taxing authorities. No evidence of any kind is shown to evince an

intent to protect debts to private insurance companies from discharge through state law subrogation theories.

Futhermore, the doctrine of subrogation is not a matter of strict right but is purely equitable in nature, dependent upon the facts and circumstances of each particular case and where the result would not be adverse to public policy. In re Alloway, 37 B.R. 420 (E.D.PA. 1984); In re Smothers, 60 B.R. 733 (W.D.KY. 1986).

The overall legislative purpose for the Bankruptcy Code favors the discharge of debts and to provide a "fresh start". National Collection Agency, Inc. vs. Trahan, supra; In re Smothers, supra. "....exceptions to dischargeability are to be strictly construed against an objecting creditor and in favor of the debtor's right to discharge." In re Morris, (N.D.

Iowa 1981). To deny dischargeability of the claim of Respondent, Hartford Casualty Insurance Company, would place such a financial burden on the Petitioner, Herbert W. Fields, Jr., as to defeat the general intent and purpose of the Bankruptcy Code.

The burden of proving exception to discharge is on the party seeking such relief. In re Alloway, supra. The Respondent, Hartford, relies on the case of Gilbert v. United States Fidelity and Guaranty Company, 180 F. Supp. 794 (M.D. Ga. 1959), aff'd per curiam, 274 F.2d 823 (5th Cir. 1960) as having a similar fact situation decided in the Fifth Circuit and the Fifth Circuit Court agreed. However, this ruling was decided almost thirty (30) years ago under the old Bankruptcy Act. In light of current conflicting case law under the new Bankruptcy Code, this court

may choose to weigh the facts of the instant case pursuant to current public policy, current cases, and the general intent and purpose behind the more liberal Bankruptcy Code, and thereby render a decision in favor of the Petitioner.

The policy behind statutory exception to dischargeability of tax debts "is to promote the collection of taxes". In re Smothers, supra; Trahan, supra. Respondent, Hartford, is an insurance company, not a taxing authority, and having admitted that the taxes have been paid to the State of Texas, to render a determination as requested by the Respondent would not promote the collection of taxes since the debt to the state has been satisfied. Petitioner recognizes the need to promote the collection of taxes, which are the primary source of revenue government entities have

to provide the necessary services for the public. However, the debt under consideration is clearly not taxes, but is the result of a contractual relationship to Respondent by way of indemnity. This contract was entered into in the ordinary course of business by Respondent and was freely negotiated by both parties. Respondent is an entity incorporated for the purpose of profit-making pursuits, whose primary source of income is from the collection of premiums from those who seek its insurance services (and investment of profits). Respondent has assumed the risk of profit and loss as an entrepreneur, and has the option of increasing rates charged to its customers to recover the costs of doing business. To rule against the Petitioner by not allowing discharge of the debt, would place an extreme financial burden and

hardship contrary to the federal bankruptcy policy favoring the discharge of debts and the "fresh start" the Bankruptcy Code provides, and elevate state law subrogation over the clear language and intent of the Bankruptcy Code. The Ninth Circuit Court of Appeals stated this position well in the case of National Collection Agency, Inc. vs. Trahan, supra. In a footnote in Trahan, the court recognized that the cost of sureties may increase by this holding, but noted that his decision would in no way adversely affect the collection of taxes. The court held steadfast to the overriding policy favoring dischargeability of debts, and upheld the supremacy clause of the Constitution of the United States, U.S. CONST. Art. VI, Section 2, by declining to override the federal Bankruptcy Code and impose the state law theory of equitable

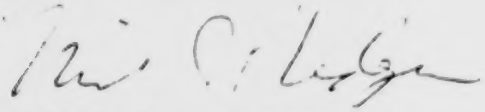
subrogation.

"....the determination of dischargeability is a federal question and must be based upon whether the debt actually possesses the characteristics of a tax." In re Beaman, (D.Oregon 1980). There is no question that the debt due the State of Texas was a tax. However, the debt due Appellee, Hartford, is a contractual debt of indemnity, where Appellee bases its right to dischargeability by the doctrine of subrogation as provided by state law.

CONCLUSION

The federal Bankruptcy Code and its provisions enacted pursuant to constitutional mandate must be upheld in light of the legislative intent and clear purpose of its discharge provisions. To allow state law to control the definition of "taxes" and therefore control the issue of dischargeability of debts, is to render the federal power impotent and to allow the several states to impermissably control the discharge provisions by enacting whatever definitions of "taxes" that they see fit. Petitioner, Herbert W. Fields, Jr., prays this court to grant certiorari, reverse the decision holding the debt to Respondent, Hartford Casualty Insurance Company, nondischargeable, and render judgment finding said debt to be discharged.

Respectfully submitted,



MICHAEL J. PLEDGER
Attorney for Petitioner
3120 Southwest Freeway
Suite 618
Houston, Texas 77098
(713) 526-1639

APPENDIX

Exhibit 1	U.S. Bankruptcy Court Order Signed 3/15/89
Exhibit 2	U.S. District Court Order Signed 7/12/90
Exhibit 3	U.S. Court of Appeals, Fifth Circuit, Order Signed 3/21/91

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	)	
	)	
HERBERT W. FIELDS, JR.	)	CASE NO. 84-06303-H1-7
	)	
Debtor	)	
	)	
HARTFORD CASUALTY INSURANCE COMPANY	)	
	)	
Plaintiff	)	
	)	
VS.	)	ADVERSARY NO. 88-0109-H1
	)	
HERBERT W. FIELDS, JR.	)	
	)	
Defendant	)	

ORDER

After careful consideration of all pleadings, memoranda and authorities of law, the motion to dismiss the complaint is denied. The Claim of Hartford Casualty Insurance Company in the amount of $15,479.58 is determined to be nondischargeable. Attorney fees and costs are awarded to Hartford.

EXHIBIT 1

Signed this the 15th day of March, 1989.

/s/
MANUEL D. LEAL
UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	)	
	)	
HERBERT W. FIELDS, JR.,	)	CIVIL ACTION
	)	NO. H-89-1351
Debtor.	)	Bkcy. No.
	)	84-06303-H1-7
	)	Adversary No.
	)	88-0109-H1

ORDER

Debtor, Herbert W. Fields, Jr. (hereafter "Fields") has appealed the order of the Bankruptcy Court granting nondischargeability of a tax debt paid by a contractual surety, Hartford Casualty Insurance Company (hereafter "Hartford"). The Bankruptcy Judge's Order shall be affirmed.

Hartford issued a surety bond covering a mixed beverage permit to Fields as the owner of corporations known as Corky's Country and Carlos' 'N Charlies

Del Norte, Inc. The surety agreement bound Fields as principal and Hartford as surety to the rights of the State of Texas for payment of all permit fees, subrogating service fees, taxes and penalties leveraged by the Texas Alcoholic Beverage Commission. Fields filed a Chapter 11 bankruptcy petition on December 28, 1984. During the periods of December 28, 1984 to October 16, 1985 and February 19, 1985 to October 2, 1985, Fields failed to pay taxes covered by the surety bonds. Pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State on November 21, 1985. This case was converted to a Chapter 7 case on October 29, 1986.

The first issue before the Court is whether the claim for the debt is barred. Under 11 U.S.C. Section 348(d), claims arising prior to conversion are treated as

prepetition, with the exception of administrative claims. The debt for taxes arose prior to the conversion of the case to a Chapter 7 claim. Therefore, the claim of Hartford is treated as a prepetition claim, and is not barred.

The second issue before the court is whether the debt owed to Hartford for taxes paid pursuant to a surety agreement is dischargeable under the Bankruptcy Code. Under Section 523(a)(1)(A) of the Bankruptcy Code, a discharge under Sections 727, 1141, 1228(a), 1228(b), or 1328(b) of Title 11 does not discharge an individual debtor from any debt for a tax of the kind and for the period specified in Section 507(a)(2) or 507(a)(7) of Title 11. The Fifth Circuit has held that a surety which pays a debtor's tax liability is subrogated to the right of the taxing entity to prevent a discharge of the tax

debt under federal bankruptcy law. Gilbert v. United States Fidelity & Guaranty Co., 274 F.2d 823 (5th Cir. 1960), aff'd, 180 F. Supp. 794 (M.D. Ga. 1959).

The Eleventh Circuit adopted the reasoning of Gilbert in In the Matter of Waite, 698 F.2d 1177 (11th Cir. 1983). Under similar facts, a surety paid an alcoholic beverage tax for a principal who later filed for bankruptcy. The court ruled that a surety which paid a debtor's liquor sales tax liability to the state of Tennessee was subrogated to the right of the taxing entity to prevent discharge of the tax debt under the Bankruptcy Code. This Court follows the opinion of the Eleventh Circuit in Waite.

In addition, the principle of subrogation has been recognized in Texas courts. The Supreme Court of Texas has

held that if a surety or party in the position of a surety pays the debt of the principal, the surety is subrogated to all of the rights, remedies, equities, and securities of the creditor and can bring an action on the debt itself against the principal. Crimmins v. Lowry, 691 S.W.2d 582 (Tex. 1985). As a result the Court finds the debt owed by Fields to Hartford for taxes paid pursuant to the surety agreement are nondischargeable under the Bankruptcy Code. Therefore, it is

ORDERED that the Order of the United States Bankruptcy Court signed March 15, 1989 is AFFIRMED. It is further

ORDERED that there being no further pending dispute in this case, the appeal is DISMISSED.

IT IS SO ORDERED.

Signed this 12th day of July, 1990 at Houston, Texas.

/s/
NORMAN W. BLACK
UNITED STATES
DISTRICT JUDGE

In the Matter of Herbert W. FIELDS, Jr., Debtor.

HARTFORD CASUALTY INSURANCE COMPANY, Appellee,

v.

Herbert W. Fields, Jr., Appellant.

No. 90-2735
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

March 21, 1991.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The Debtor, Herbert W. Fields ("Debtor"), appeals from the district court's refusal to discharge a certain

EXHIBIT 3

debt to his surety, Hartford Casualty Insurance Co. ("Hartford"), incurred when Hartford paid taxes on his behalf to the State of Texas. The issue presented by this case is whether Hartford can be subrogated to the State of Texas' right to an exception from discharge under 11 U.S.C. Section 523(a)(1)(A)[1] of the Bankruptcy Code. Holding that Hartford is entitled to subrogation, we affirm.

---

[1] Section 523(a)(1)(A) of the Bankruptcy Code provides:

> (a) A discharge under section 727, 1141, 1228(b), or 1328 (b) of this title does title does to discharge an individual Debtor from any debt-
>
> (1) for a tax or a customs duty
>
> (A) of the kind and of periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

I

The facts are brief and uncontested. Hartford issued a surety bond covering a mixed beverage permit to Debtor as the owner of two corporations known as Corky Country and Carlos' 'N Charlies Del Norte, Inc.[2] The surety agreement bound Debtor as principal and Hartford as surety to the rights of the State of Texas for payment of all fees, taxes and penalties levied by the Texas Alcoholic Beverages Commission ("TABC").

Debtor filed for bankruptcy protection in late December 1984. Subsequently, during the periods of December 28, 1984 to October 16, 1985, and February 19, 1985 to October 2, 1985,

---

[2] Texas Alcoholic Beverage Code Section 204.01 (Vernon 1978 & 1991 Supp.) requires licensees and permittees of mixed beverages to furnish a bond to secure the payment of the gross receipts tax.

Debtor failed to pay taxes covered by the surety bonds. Pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State on November 21, 1985.

II

On December 28, 1984, Debtor filed his Chapter 11 bankruptcy petition and properly scheduled Hartford as a creditor. The case was converted to a Chapter 7 case on October 29, 1986. The Chapter 7 Creditor's Meeting was noticed and held on December 16, 1986, and the deadline for filing complaints to determine dischargeability under 11 U.S.C. 523(c) was established as February 16, 1987. Hartford failed to file a Complaint to Determine Dischargeability of Debt until February 9, 1988, nearly one year after the bar date. Debtor filed his Motion to Dismiss Complaint on March 9, 1988.

The Bankruptcy Court denied Debtor's motion, determining that Hartford's claim was nondischargeable under 11 U.S.C. Section 523(a)(1)(A). Debtor appealed to the district court on the grounds that the debt was not automatically nondischargeable as taxes and that under any other theory Hartford's Complaint was not timely filed. The district court, however, affirmed the Bankruptcy Court's decision. Debtor timely appeals.

III

Initially, we note that if there had been no surety arrangement in this case and the claim was asserted by the State of Texas rather than Hartford, the debt would be nondischargeable under 11 U.S.C.

Section 523(a)(1)(A).[3] We must decide, however, whether a surety who pays a tax debt of another is subrogated to the State's right to an exception from discharge. As with all such claims, the party seeking an exception to discharge bears the burden of proof as to nondischargeability. In re Benich, 811 F.2d 943 (5th Cir.1987).

Debtor argues that the debt due Hartford arose as a result of an indemnity agreement, rather than as a tax. The tax

---

[3] It is uncontested that the taxes in question in this case are nondischargeable pursuant to Section 507(a)(7). Section 507(a)(7), concerning priority of claims, lists a number of taxes including a "tax required to be collected or withheld and for which the debtor is liable in whatever capacity." The legislative history reveals that this category of taxes "includes excise taxes which a seller of goods is required to collect from a buyer and pay over to a taxing authority." S.Rep. No. 989, 95th Cong., 2d Sess. 71, reprinted in 1978 U.S.Code Cong. & Ad.News 5787,5857.

exception, according to Debtor, was promulgated to facilitate tax collection and because Hartford is not a taxing authority, this policy concern is not promoted by rendering Hartford's claim nondischargeable. Similarly, there is no need to protect the surety, argues the Debtor, as the fees charged by Hartford for the issuance of surety bonds are designed to protect Hartford against losses. Debtor concludes that because Hartford is not a taxing authority, it has no right to levy taxes and is not entitled to nondischargeability status under 11 U.S.C. Section 523(a)(1)(A). We are unpersuaded.

We last confronted this issue over thirty years ago in Gilbert v. United States Fidelity & Guaranty Co., 180 F.Supp. 794 (M.D.Ga.1959), aff'd per cuiam, 274 F.2d 823 (5th Cir.1960).

Gilbert is similar to the case at bar. Pursuant to a surety agreement, USF & G paid taxes due the State of Georgia that Gilbert had failed to pay. After Gilbert was adjudicated bankrupt, he sought a determination that the debt owed the surety was discharged in his bankruptcy. The district court, however, held that the surety benefitted from a Georgia subrogation statute, and the taxes were treated as still due for the benefit of the surety. Gilbert, 180 F.Supp. at 796. We affirmed the holding that under the Bankruptcy Act, a surety who pays a debtor's tax liability is subrogated to the taxing authority's status to prevent the discharge of a claim for unpaid taxes. 274 F.2d at 823.

Gilbert was decided, however, under the old Bankruptcy Act. Debtor argues that the adoption of the new Bankruptcy

Code permits us to reexamine this issue and, if warranted, to disregard Gilbert. We acknowledge that if the Bankruptcy Code created a substantive departure from the Bankruptcy Act on the issue of a surety subrogation to tax debts, we would be released, at least to a degree, from the precedential restraint of Gilbert. We believe that the adoption of the Bankruptcy Code, however, did not alter in any significant way, the bankruptcy law with respect to this issue.[4] We are therefore bound by our previous decision in Gilbert. See Ford v. United States, 618 F.2d 357, 362 (5th Cir.1980). As

---

[4] Specifically, the Bankruptcy Act provided that a "discharge in bankruptcy shall release a bankrupt from...all of his provable debts...except such as (1) are due as a tax..." 11 U.S.C Section 35 (1964) (repealed). Section 523(a)(1) of the Bankruptcy Code states that a "discharge...does not discharge an individual debtor from any debt for a tax..."

stated in Gilbert, "it is as if the taxes themselves have not been paid and are still due and, of course, are not dischargeable in bankruptcy." 180 F.Supp. at 796. Accordingly, we hold that Hartford, having paid Debtor's taxes to the TABC, is subrogated to all the rights that the State of Texas had against Debtor under the Bankruptcy Code.[5]

---

[5] Gilbert relied on a Georgia law that permitted subrogation. Similarly, we note that the principle of subrogation is well recognized in Texas. Texas law provides that a surety "is subrogated to all of the judgment creditor's rights." Tex.Bus & Comm.Code Ann. Section 34.04 (Vernon 1990). The Texas Supreme Court has also held that a surety is subrogated to all of the rights of the original creditor:

> Because the surety promises to pay the debt of another, equity confers the right of subrogation. If the surety or party in the position of a surety pays the debt of the principal, the surety is subrogated to all of the rights, remedies, equities, and securities of the creditor.
> Crimmins v. Lowry, 691 S.W.2d 582, 585 (Tex.1985).

The Eleventh Circuit has also concluded that our holding in Gilbert survives the adoption of the Bankruptcy Code. In In re Waite, 698 F.2d 1177 (11th Cir.1983), the surety made an identical claim as Hartford. The surety argued that it was entitled to be subrogated to the rights and standing of the State of Tennessee to assert nondischargeability under 11 U.S.C. Section 523(a)(1)(A) for unpaid liquor sales taxes of the kinds specified by 11 U.S.C. Section 507(a)(6).[6] The Eleventh Circuit agreed, holding specifically that Gilbert survived the enactment of the Bankruptcy Code.[7] The

[6] Now 507(a)(7), renumbered 1984.

[7] Because decisions of the Fifth Circuit that were decided on or before September 20, 1981, are binding on the Eleventh Circuit, the Waite court necessarily had to address the same issue with respect to the precedential effects of Gilbert. See, e.g., Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir.1981).

Waite court reasoned that:

> While Gilbert concerned the old Bankruptcy Act, the new Bankruptcy Code does not furnish a principled basis for distinguishing this case. Neither statute expressly indicates whether the nondischargeability of tax debts extends to debts owed to a surety which has paid the Debtor's tax debts.

698 F.2d at 1178. We note that the majority of courts that have addressed this issue have likewise held that a surety is entitled to subrogation under Section 523(a)(1)(A).[8]

[8] See, e.g., In re Norris, 107 B.R. 592 (E.D. Tenn.1989); In re Trasks' Charolais, 84 B.R. 646 (D.S.D.1988); In re Cooper, 83 B.R. 544 (C.D.Ill.1988); In re Zoglman, 78 B.R. 213 (W.D. Wis.1987); In re Caffrey, 77 B.R. 219 (W.D.Mo.1987); In re Morris, 31 B.R. 474 (N.D.Ill.1983); In re Alloway, 37 B.R. 420 (E.D.Pa.1984); In re Hancock, 36 B.R. 709 (S.D.Ill.1984); In re Woerner, 19 B.R. 708 (D.Kan.1982); In re Gibbs, 11 B.R. 320 (W.D.Mo.1981).

The Ninth Circuit is the one notable

---

exception to this majority. See, e.g., National Collection Agency, Inc. v. Trahan, 624 F.2d 906(9th Cir.1980). The Trahan court expressly refused to follow our decision in Gilbert. 624 F.2d at 907-08. The court emphasized a general policy of the Bankruptcy Code was to grant debtors a fresh start. Nevertheless, it recognized an exception to this policy for taxes because of the "overriding need to assure tax collection by government entities." Id. at 907. The court reasoned that permitting a surety to assert the rights of the State would not promote the collection of taxes, and would actually run contrary to the policy of providing debtors a fresh start. Id. As a result, the Trahan court held that California surety law conflicted with federal bankruptcy law. Id.

We disagree. Because Texas required the bond specifically to secure payment of the taxes, we think the debt paid by the surety is a tax "of the kind" specified in Section 506(a)(7). Furthermore, we do not see how the Gilbert holding interferes with the fresh start contemplated for debtors by the code:

> [a] debtor's fresh start is not overburdened by excepting a surety's subrogation claim from discharge. The debtor's fresh start is the same; he owes the same amount of nondischargeable tax debt; the only difference is whether the debtor owes the debt to the government or the surety.

In re Norris, 107 B.R. 592, 596 (E.D.Tenn.1989).

IV

Because Hartford has met its burden of proving that it is entitled to be subrogated to the nondischargeability rights of the State of Texas, the decision of the district court is

AFFIRMED.

Supreme Court, U.S.
FILED
OCT 8 1991
OFFICE OF THE CLERK

NO. 91-0110

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

HERBERT W. FIELDS, JR.,
Petitioner,

V.

HARTFORD CASUALTY INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Gary L. Wickert
Counsel of Record
Loren R. Smith
HUGHES, WATTERS & ASKANASE
1415 Louisiana, 37th Floor
Houston, Texas 77002
(713) 759-0818

ATTORNEYS FOR RESPONDENT,
HARTFORD CASUALTY INSURANCE
COMPANY

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 91-0110

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

HERBERT W. FIELDS, JR.,
Petitioner,

V.

HARTFORD CASUALTY INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Gary L. Wickert
Counsel of Record
Loren R. Smith
HUGHES, WATTERS & ASKANASE
1415 Louisiana, 37th Floor
Houston, Texas 77002
(713) 759-0818

ATTORNEYS FOR RESPONDENT,
HARTFORD CASUALTY INSURANCE
COMPANY

QUESTION PRESENTED

Whether a surety who pays a tax debt of another is subrogated to the State's right to an exception from discharge under 11 U.S.C. § 523(a)(1)(A).

LIST OF PARTIES

Herbert W. Fields, Jr.
- Petitioner

Michael J. Pledger,
PLEDGER & PLEDGER
- Counsel for Petitioner

Hartford Casualty Insurance Company
- Respondent

Gary L. Wickert, Loren R. Smith,
HUGHES, WATTERS & ASKANASE
- Counsel for Respondent

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST OF PARTIES. ii

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES. v

CONSTITUTIONAL PROVISIONS AND STATUTES. viii

STATEMENT OF THE CASE 2

A. Factual Background 2

B. Procedural History 3

REASONS THE PETITION SHOULD BE DENIED 4

I. ALL COURTS BUT ONE FACED WITH THE ISSUE OF THIS CASE HAVE HELD THAT A SURETY IS SUBROGATED TO THE NONDISCHARGEABLE RIGHT OF A TAXING AUTHORITY. 6

II. THIS CASE CONTAINS NO SUPREMACY CLAUSE ISSUE BECAUSE FEDERAL BANKRUPTCY LAW SUPPORTS HOLDING HARTFORD'S CLAIM NONDISCHARGEABLE. 8

A. 11 U.S.C. § 523(a)(1)(A) Supports Holding Hartford's Claim Nondischargeable. 9

PAGE

B. 11 U.S.C. § 509(a) Supports Holding Hartford's Claim Nondischargeable. 11

C. 11 U.S.C. § 507(d) Supports Holding Hartford's Claim Nondischargeable. 12

III. PUBLIC POLICY SUPPORTS HOLDING HARTFORD'S CLAIM NONDISCHARGEABLE. . 13

CONCLUSION 18

APPENDIX 19

TABLE OF AUTHORITIES

CASES **PAGE**

Cooper v. Cooper (In re Cooper), 83 Bankr. 544 (Bankr. C.D. Ill. 1988). 7,8,9,12

Crimmins v. Lowry, 691 S.W.2d 582 (Tex. 1985) 8

Federal Mutual Ins. Co. v. Gibbs (In re Gibbs), 11 Bankr. 320 (Bankr. W.D. Mo. 1981). 7

Fidelity & Casualty Co. v. Whitaker, 176 Ga. 656, 168 S.E. 607 (Ga. 1933) 5

Garton v. Zoglman (In re Zoglman), 78 Bankr. 213 (Bankr. W.D. Wis. 1987). 7

Gilbert v. United States Fidelity & Guaranty Co., 180 F. Supp. 794 (M.D. Ga. 1959), *aff'd*, 274 F.2d 823 (5th Cir. 1960) 7

Gordon's Jewelry Co. of New Jersey, Inc. v. Goldstein (In re Goldstein), 66 Bankr. 909 (Bankr. W.D. Pa. 1986). 7,10,11,12,13

Hancock v. Country Mutual Ins. Co. (In re Hancock), 36 Bankr. 709 (Bankr. S.D. Ill. 1984). 7

CASES (continued) **PAGE**

Hartford Casualty Insurance Company v. Fields (In re Fields), 926 F.2d 501 (5th Cir. 1991). 2,6,7,9,10,18

In re Trasks' Charolais, 84 Bankr. 646 (Bankr. D. S.D. 1988). 7

Nat'l Collection Agency, Inc. v. Trahan, 624 F.2d 906 (9th Cir. 1980). 7,10,11,15,16

Rankin v. Alloway (In re Alloway), 37 Bankr. 420 (Bankr. E.D. Pa. 1984) 7

Safeco Ins. Co. of America v. Norris (In re Norris), 107 Bankr. 592 (Bankr. E.D. Tenn. 1989). . 7,12,14,16,17

St. Paul Mercury Indemnity Co. v. Donaldson, 225 S.C. 476, 83 S.E.2d 159 (S.C. 1954) 7

Salaki v. Caffrey (In re Caffrey), 77 Bankr. 219 (Bankr. W.D. Mo. 1987). 7

Thomas Int'l Corp. v. Morris (In re Morris), 31 Bankr. 474 (Bankr. N.D. Ill. 1983). 7

Western Surety Co. v. Waite (In re Waite), 698 F.2d 1177 (11th Cir. 1983). 7,12

CASES (continued) **PAGE**

Woerner v. Farmers Alliance Mutual Ins. Co. (In re Woerner), 19 Bankr. 708 (Bankr. D. Kan. 1982). . . . 7

STATUTES

11 U.S.C. § 35. 10

11 U.S.C. § 507(a)(6)[now § 507(a)(7), renumbered 1984]. 10

11 U.S.C. § 507(a)(7) 8,9,10

11 U.S.C. § 507(d). 9,12,13

11 U.S.C. § 509(a). 9,11

11 U.S.C. § 523. 10

11 U.S.C. § 523(a)(1)(A). . . .6,7,9,10,12

Tex. Alco. Bev. Code Ann. § 204.01(a)(3) (Vernon 1978). 2

Tex. Bus. & Comm. Code Ann. § 34.04(b) (Vernon 1987). 8

MISCELLANEOUS

Redmond, B., *Annotation--Bankruptcy: Codebtor's Subrogation Rights under 11 USCS § 509*, 86 A.L.R. Fed. 886, 895. 11,12

CONSTITUTIONAL PROVISIONS AND STATUTES

11 U.S.C. § 523(a)(1)(A):

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(1) for a tax or a customs duty-

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

11 U.S.C. § 509(a):

(a) Except as provided in subsection (b) or (c) of this section, an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment.

11 U.S.C. § 507(d):

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), or (a)(6) of this section is not subrogated to the right of the holder of such claim to priority under such section.

NO. 91-0110

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

HERBERT W. FIELDS, JR.,
Petitioner,

V.

HARTFORD CASUALTY INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Hartford Casualty Insurance Company ("Hartford") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the

Fifth Circuit in this case. The opinion of the Fifth Circuit is reported at 926 F.2d 501 (5th Cir. 1991).

STATEMENT OF THE CASE

A. Factual Background

Petitioner Herbert W. Fields, Jr. ("Fields") filed for protection under Chapter 11 of the Bankruptcy Code on December 28, 1984. Hartford issued two surety bonds for corporations owned by Fields in favor of the State of Texas. These surety bonds covered a mixed beverage permit bond for corporations owned by Fields known as Corky's Country and Carlos' 'N Charlie's Del Norte, Inc. The bonds, required by Tex. Alco. Bev. Code Ann. § 204.01(a)(3) (Vernon 1978), bound Fields as principal and Hartford as surety to the State of Texas for payment of all permit fees, service fees, taxes

and penalties assessed by the Texas Alcoholic Beverage Commission. The bonds covered taxes for the periods of December 28, 1984 to October 16, 1985 and February 19, 1985 to October 2, 1985.

Fields failed to pay the taxes. Pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State of Texas on November 21, 1985. Fields's bankruptcy case was administratively consolidated with Corky's Country and Carlos' 'N Charlie's Del Norte, Inc. on January 11, 1986. Then, on October 29, 1986, the bankruptcy case was converted to a case under Chapter 7.

B. Procedural History

Hartford Casualty Insurance Company filed its "Complaint to Determine Dischargeability of Debt Pursuant to 11 U.S.C. 523(a)(1)(A)" in Fields's

bankruptcy case on February 9, 1988. The United States Bankruptcy Court for the Southern District of Texas, Houston Division, ruling in Hartford's favor, entered an order on March 16, 1989 declaring Hartford's claim against Fields based on its payment to the State of Texas as a surety for Fields's tax debt nondischargeable. The United States District Court for the Southern District of Texas, Houston Division, affirmed the Bankruptcy Court's order of nondischargeability on July 13, 1990. The United States Court of Appeals for the Fifth Circuit affirmed the District Court and Bankruptcy Court rulings on March 21, 1991. This case is an appeal of the Fifth Circuit's decision.

REASONS THE PETITION SHOULD BE DENIED

Fields fails to raise any special or

important reasons to warrant granting its petition for a writ of certiorari. The arguments made by Fields have been decided against him by every court reviewing the issue with only one aberration. The only Circuit that has decided the issue contrary to Hartford's position did so in a case under the Bankruptcy Act, and the two Circuits ruling on the issue under the Bankruptcy Code have ruled in favor of Hartford's position. Contrary to Field's argumentative statement of the question presented, this case does not involve preemption. The Fifth Circuit's ruling that Hartford is subrogated to the rights of the State of Texas is supported by the provisions of the Bankruptcy Code.

It is uncontested that the tax debt owed by Fields to the State of Texas is of the type that is excepted from discharge

pursuant to 11 U.S.C. § 523(a)(1)(A). *Fields*, 926 F.2d at 503, fn.3. As the Fifth Circuit observed, "if there had been no surety arrangement in this case and the claim was asserted by the State of Texas rather than Hartford, the debt would be nondischargeable under 11 U.S.C. § 523(a)(1)(A)." *Id.* Hartford, which paid the debt as a surety, should be subrogated to the State of Texas's right to an exception from discharge.

I. ALL COURTS BUT ONE FACED WITH THE ISSUE OF THIS CASE HAVE HELD THAT A SURETY IS SUBROGATED TO THE NONDISCHARGEABLE RIGHT OF A TAXING AUTHORITY

Every court dealing with the issue of this case has ruled that a surety is subrogated to a taxing authority's standing to assert nondischargeability

under 11 U.S.C. § 523(a)(1)(A),[1] with only one aberration. The only contrary decision, the case upon which Fields principally relies,[2] was decided under the Bankruptcy Act. Since there is almost

---

[1]*See Fields*, 926 F.2d at 504; *Western Surety Co. v. Waite (In re Waite)*, 698 F.2d 1177 (11th Cir. 1983); *Gilbert v. United States Fidelity & Guaranty Co.*, 180 F. Supp. 794 (M.D. Ga. 1959), *aff'd*, 274 F.2d 823 (5th Cir. 1960); *Safeco Ins. Co. of America v. Norris (In re Norris)*, 107 Bankr. 592 (Bankr. E.D. Tenn. 1989); *In re Trasks' Charolais*, 84 Bankr. 646 (Bankr. D. S.D. 1988); *Cooper v. Cooper (In re Cooper)*, 83 Bankr. 544 (Bankr. C.D. Ill. 1988); *Garton v. Zoglman (In re Zoglman)*, 78 Bankr. 213 (Bankr. W.D. Wis. 1987); *Salaki v. Caffrey (In re Caffrey)*, 77 Bankr. 219 (Bankr. W.D. Mo. 1987); *Gordon's Jewelry Co. of New Jersey, Inc. v. Goldstein*, 66 Bankr. 909 (Bankr. W.D. Pa. 1986); *Thomas Int'l Corp. v. Morris (In re Morris)*, 31 Bankr. 474 (Bankr. N.D. Ill. 1983)[not to be confused with *Iowa State Dept. of Social Services v. Morris (In re Morris)*, 10 Bankr. 448 (Bankr. N.D. Iowa 1981), cited by Fields without page reference]; *Rankin v. Alloway (In re Alloway)*, 37 Bankr. 420 (Bankr. E.D. Pa. 1984); *Hancock v. Country Mutual Ins. Co. (In re Hancock)*, 36 Bankr. 709, (Bankr. S.D. Ill. 1984); *Woerner v. Farmers Alliance Mutual Ins. Co. (In re Woerner)*, 19 Bankr. 708 (Bankr. D. Kan. 1982); *Federal Mutual Ins. Co. v. Gibbs (In re Gibbs)*, 11 Bankr. 320 (Bankr. W.D. Mo. 1981); *Fidelity & Casualty Co. v. Whitaker*, 176 Ga. 656, 168 S.E. 607 (Ga. 1933); *St. Paul Mercury Indemnity Co. v. Donaldson*, 225 S.C. 476, 83 S.E.2d 159 (1954).

[2]*Nat'l Collection Agency, Inc. v. Trahan*, 624 F.2d 906 (9th Cir. 1980).

universal agreement on the issue of this case, it does not merit certiorari.

II. THIS CASE CONTAINS NO SUPREMACY CLAUSE ISSUE BECAUSE FEDERAL BANKRUPTCY LAW SUPPORTS HOLDING HARTFORD'S CLAIM NONDISCHARGEABLE.

This case does not present a Supremacy Clause issue. The question facing this court is not a conflict between Federal Bankruptcy law and state law, but is one of interpretation of the provisions of the Bankruptcy Code.[3]

---

[3]Fields contends that the Fifth Circuit chose state subrogation law over Federal Bankruptcy law. The state law Fields refers to is Tex. Bus. & Comm. Code Ann. § 34.04(b) (Vernon 1987) which provides that a surety "is subrogated to all of the judgment creditor's rights." Also, the Supreme Court of Texas has held that a surety is subrogated to all of the rights of the original creditor: "Because the surety promises to pay the debt of another, equity confers the right of subrogation. If the surety or party in the position of a surety pays the debt of the principal, the surety is subrogated to all of the rights, remedies, equities, and securities of the creditor." Crimmins v. Lowry, 691 S.W.2d 582, 585 (Tex. 1985).

However, the Fifth Circuit based its holding in part on the language of 11 U.S.C. § 507(a)(7): "Because Texas required the bond specifically to secure payment of the taxes, we think the debt paid

Hartford's right of subrogation is supported by a careful reading of Federal Bankruptcy statutes 11 U.S.C. § 523(a)(1)(A), 11 U.S.C. § 509(a), and 11 U.S.C. § 507(d).

A. 11 U.S.C § 523(a)(1)(A) Supports Holding Hartford's Claim Nondischargeable.

Section 523(a)(1)(A) supports holding Hartford's claim nondischargeable. On its face, 11 U.S.C. § 523(a)(1)(A) may be read to allow such subrogation.

> While the Court is aware of the rule that (sic) the nondischargeability provisions are to be read liberally in favor of a debtor's fresh start, to read section 523(a)(1) to be limited to debts actually owed to the tax collector or those obligations actually entitled to priority under section 507(a)(7) of the Code would be to read into the statute language that is simply not there.

---

by the surety is a tax "of the kind" specified in § 507(a)(7)(sic)." *Fields*, 926 F.2d at 504, fn.8.

Cooper, 83 Bankr. at 544.

> The Debtor argues that [the surety] is not entitled to this subrogated status, claiming that this status is for governmental entities only. The very face of the various sections of the Bankruptcy Code speak otherwise. Section 523(a)(1)(A) holds nondischargeable any debt for a tax *of the kind* specified in § 507(a)(6)[now § 507(a)(7), renumbered 1984].

Goldstein, 66 Bankr. at 920 (emphasis original). A debt paid by a surety for nonpayment of taxes is a tax *of the kind* specified in 11 U.S.C. § 507(a)(7). As the Fifth Circuit reasoned, since Texas by statute specifically requires the bond for payment of taxes, the debt falls under the Bankruptcy Code's definition of "tax". *Fields*, 926 F.2d at 504, fn.8.[4]

---

[4]It should be noted that *Trahan* was decided under the former 11 U.S.C. § 35, a statute which did not have the "of the kind" language which is now contained in § 523(a)(1)(A). "The exception appears in altered form in the new statute, which does not have retroactive applicability. *See* 11 U.S.C. § 523." *Trahan*, 624 F.2d at 907, fn.1. As

B. 11 U.S.C. § 509(a) Supports Holding Hartford's Claim Nondischargeable.

Section 509(a) also supports holding Hartford's claim nondischargeable. The express provision of subrogation for a surety in § 509(a) extends to the right of nondischargeability as well:

> While the Court has previously explained its reason for finding the Debtor's equitable claims here inappropriate, we find that even if this characterization were appropriate, [the surety] would still have the rights requested, under § 509(a) of the Code. . . .
>
> As [the surety] paid the taxing authority, it is subrogated to the taxing body's right to payment, which includes the right to have the payment held to be nondischargeable.

Goldstein, 66 Bankr. at 920. *See also* Redmond, B., *Annotation--Bankruptcy: Codebtor's Subrogation Rights under 11*

---

such, the holding of *Trahan* has been undercut by the enactment of the Bankruptcy Code.

USCS § 509, 86 A.L.R. Fed. 886, 895.

C. 11 U.S.C. § 507(d) Supports Holding Hartford's Claim Nondischargeable.

Section § 507(d) also supports holding Hartford's claim nondischargeable. This section provides that a surety is not subrogated to the *priority* status of a taxing authority. However, courts have held that this section does not prevent a surety from being subrogated to *nondischargeability* status of a taxing authority.[5] Instead, if a surety's claim

---

[5]*Waite*, 698 F.2d at 1178; *Cooper*, 83 Bankr. at 548, & fn.12 ("The fact that section 507(d) denies the priority to that claim does not alter the character of the claim and is wholly irrelevant to dischargeability. Nothing in section 523(a)(1) makes dischargeability of a tax claim of this type contingent on actual entitlement to priority."); *Goldstein*, 66 Bankr. at 920 ("We read this as it is stated-that the taxes held nondischargeable are the same taxes listed as having priority status under § 507-not that the priority itself has any effect on the debt's nondischargeable status."); *Norris*, 107 Bankr. at 594 ("However, the right to priority under § 507 is not required in order for a tax debt to be nondischargeable under § 523(a)(1)(A).").

was not subrogated to the nondischargeable status, § 507(d) would be unnecessary.

> This section evidences two things to this Court:
>
> > (1) a tax claim *can* be subrogated; and,
> >
> > (2) the subrogee is not entitled to the subrogor's priority status.
>
> If another entity, such as [the surety], could not be subrogated to a tax claim, the language including tax claims in § 507(d) would be unnecessary. As it must be assumed that Congress would not include superfluous language in the statute, it must be given its clear meaning.
>
> Clearly then, it appears to this Court that [the surety] has a right to be subrogated to the right of the [taxing authority], to the extent of having its claim be held nondischargeable.

Goldstein, 66 Bankr. at 920 (emphasis original).

III. PUBLIC POLICY SUPPORTS HOLDING HARTFORD'S CLAIM NONDISCHARGEABLE.

Public policy also supports a holding

that these tax debts nondischargeable. A holding that these debts are dischargeable would ultimately harm tax-paying businesses, and would hinder businesses reorganizing under Chapter 11. Initially, it would encourage businesses with unsure financial standing to delay in paying their taxes.

> A debtor who fails to pay taxes before bankruptcy usually bears the burden of that failure after bankruptcy by being liable for a nondischargeable tax debt. However, if the debt to the surety is dischargeable, then the debtor can choose not to pay taxes with the knowledge that he can escape liability by filing bankruptcy and discharging the surety's claim. A debtor should not be given this choice. Therefore, the court adopts the view that the policy behind the dischargeability statute is better served by making the surety's claim non-dischargeable to the extent the surety paid a nondischargeable tax.

Norris, 107 Bankr. at 596. It would be especially unfair to a surety in

Hartford's position to hold these debts dischargeable, having dealt with Fields after he had filed for protection under Chapter 11. If it is determined that these debts are dischargeable, few sureties will deal with principals whose businesses are in financial trouble, especially those in reorganization under Chapter 11, out of fear that the principals or their businesses will later file or convert their cases to Chapter 7. The Ninth Circuit recognized that their holding would increase the cost of contracting with sureties. *Trahan*, 624 F.2d at 907, fn.2. However, this increased cost would ultimately be passed on to tax-paying businesses.

Fields relies on the *Trahan* rationale that the purpose of the statutory exception to discharge is to assure tax

collection by taxing authorities. *Trahan* rationalizes that the taxing authority will get paid one way or the other, either by the debtor or the surety. *Trahan*, 624 F.2d at 907. However, even if this was the only purpose behind the statutory exception, the argument is not convincing. One court, in criticizing this postulation of *Trahan*, stated:

> Suppose, however, that the exception from discharge is intended purely to preserve government revenue. If the policy of the exception from discharge is to promote the collection of taxes, then that policy is served indirectly by excepting the surety's subrogation claim from discharge. The question is whether the policy behind the exception is a narrow policy to allow the collection of nondischargeable taxes from debtors or a broader policy of promoting the payment of nondischargeable taxes by debtors *and sureties*. This court adopts the broader view of the policy behind the exception.

Norris, 107 Bankr. at 595 (emphasis original).

Finally, the argument proposed by Fields that a ruling of nondischargeability frustrates the policy of a "fresh start" is not compelling. The weakness of this argument is readily apparent:

> A debtor's fresh start is not overburdened by excepting a surety's subrogation claim from discharge. The debtor's fresh start is the same; he owes the same amount of nondischargeable tax debt; the only difference is whether the debtor owes the debt to the government or the surety.

Norris, 107 Bankr. at 596; *Fields*, 926 F.2d at 504, fn.8.

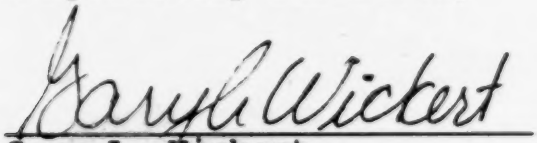
CONCLUSION

Congress intended certain tax debts to be nondischargeable in Bankruptcy. All courts but one dealing with the issue of this case

have held that a surety should be subrogated to the rights of a taxing authority in seeking an exception to discharge. To remove the surety's right of subrogation would ultimately put an unfair burden on tax-paying businesses and businesses seeking to reorganize. Finally, a debtor's fresh start will not be hampered, for the debtor will still owe the same amount of nondischargeable tax debt.

WHEREFORE, Hartford Casualty Insurance Company prays that certiorari be denied.

Respectfully submitted,



Gary L. Wickert
Counsel of Record
Loren R. Smith
1415 Louisiana, 37th Floor
Houston, Texas 77002
(713) 759-0818

APPENDIX

Appendix "A"	Tex. Alco. Bev. Code Ann. § 204 (Vernon 1978).
Appendix "B"	U.S. Bankruptcy Court Memorandum Opinion signed March 15, 1989.
Appendix "C"	Published Opinion of the U.S. Court of Appeals for the Fifth Circuit, entered March 21, 1991.

APPENDIX "A"

CHAPTER 204. BONDS

Section

204.01. Bond Required.
204.02. Form and Conditions.
204.03. Amount of Bond.
204.04. Multiple Permits, One Bond.
204.05. Cancellation of Bond.

Section 204.01. Bond Required

(a) Except as otherwise provided in this section, the following licensees and permittees shall furnish a bond:

(1) those authorized to import alcoholic beverages into the state;

(2) manufacturers of beer and brewers of ale or malt liquor in the state;

(3) permittees subject to the gross receipts tax on mixed beverages imposed by Section 202.02 of this code; and

(4) all other permittees.

(b) No bond is required of a holder of a carriers, local cartage, wine and beer retailers, nonresident seller's, manufacturer's agent's, or agent's permit.

(c) No bond is required of a retail licensee or permittee who is not responsible for the primary payment of an alcoholic beverage excise tax to this state. This subsection does not exempt permittees subject to the gross receipts tax on mixed beverages imposed by Section 202.-02 of this code.

(d) A permittee required to furnish a bond to secure the payment of the gross receipts tax on mixed beverages may furnish, in lieu of all or part of the amount of the bond required:

(1) one or more certificates of deposit or savings assigned to the state, issued by one or more banks or savings institutions authorized to do business in this state; or

(2) one or more letters of credit issued by one or more banks or savings institutions authorized to do business in this state.

(e) If certificates of deposit or savings or letters of credit are furnished under Subsection (d) of this section, the administrator shall keep them in his possession. Interest earned on a certificate of deposit or savings is not subject to the assignment and remains the property of the owner of the certificate.

Amended by Acts 1977, 65th Leg., p. 1183, ch. 453, § 11, eff. Sept. 1, 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

MAR 16 1989

Jesse E. Clark, Clerk
By Deputy:

APPENDIX "B"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
HERBERT W. FIELDS, JR.	§	CASE NO. 84-06303-H1-7
	§	
Debtor	§	
	§	
HARTFORD CASUALTY INSURANCE COMPANY	§	
	§	
Plaintiff	§	
	§	
VS.	§	ADVERSARY NO. 88-0109-H1
	§	
HERBERT W. FIELDS, JR.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION

Pending before this court is a complaint to determine dischargeability of debt pursuant to 11 U.S.C. §523(a)(1)(A), filed by Hartford Casualty Insurance Company. Also pending before this court is defendant, Herbert W. Fields', Jr., motion to dismiss complaint. After careful consideration of the pleadings and points of law raised, this court concludes that Hartford's claim is nondischargeable and that defendant's motion to dismiss is denied.

This court has jurisdiction of this proceeding pursuant to 28 U.S.C. sections 1334 and 157(b)(2)(I) and the Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc issued on August 9, 1984 by the Chief District Judge of the Southern District of Texas.

Hartford issued two surety bonds on a mixed beverage permit for corporations owned by Fields in favor of the State of Texas. The surety bonds bound Fields as principal and Hartford as surety to the State of Texas for the payment of permit fees, service fees, taxes and penalties assessed by the Texas Alcohol Commission. Taxes covered by the surety bonds were for the periods of December 28, 1984 to October 16, 1985 and February 19, 1985 to October 2, 1985. Fields failed to pay the taxes, and pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State on November 21, 1985. Fields filed a chapter 11 bankruptcy petition on December 28, 1984. This case was administratively consolidated with Carlos and Charlies Inc. and Corkey's Country, Inc. on January 11, 1986. The case was converted to a chapter 7 on October 29, 1986.

Hartford seeks recovery from Fields for the amount paid to the state. The claim for taxes arose after the filing of the chapter 11 petition but prior to conversion to chapter 7. Under 11 U.S.C. § 348(d)

> [a] claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1307, or 1208 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

With the exception of administrative claims under this section, claims arising prior to conversion are treated as prepetition claims. In its complaint, Hartford contends that the debt pursuant to surety bond qualifies as a tax falling within the ambit of 11 U.S.C. § 507(a)(7) and is excepted from discharge under 11 U.S.C. § 523(a)(1)(A).

This court is presented with the issue of whether the debt owed is nondischargeable. Initially, this court notes that the party seeking an exception to discharge bears the burden of proof as to nondischargeability. In the matter of Binich, 811 F.2d 943 (5th Cir. 1987). Fields contends that because Hartford is not a taxing authority, it has no right to

levy taxes and is not entitled to nondischargeability status under 11 U.S.C. § 523(a)(1)(A), providing an exception to discharge for taxes. Fields contends that the exception was promulgated to facilitate tax collection and that because Hartford is not a taxing authority, this policy concern is not promoted by rendering Hartford's claim nondischargeable. The fees charged by Hartford, for the issuance of surety bonds according to Fields, are designed to protect Hartford against losses. Fields contends that the debt due Hartford arose as a result of an indemnity agreement rather than as a tax.

Fields contends that dischargeability of debts should take precedence over state law theories of equitable subrogation. Fields relies on The National Collection Agency, Inc. v. Trahan, 624 F.2d 906 (9th Cir. 1980), as authority for the proposition that the dischargeability exception is not applicable to a surety which pays a tax to the state. In Trahan, a surety contracted with Trahan to post a bond with the state. Trahan failed to pay the tax, and an action was brought in state court by the surety's assignee to recover the amount paid by the surety to the state. Trahan filed bankruptcy and sought a declaration that

the debt was discharged. The court focused on two policy considerations: the favoring of discharge of debts and the collection of taxes by governmental entities. Id. at 907. The Ninth Circuit ruled that the policy promoting dischargeability of debts overrides an application of equitable subrogation, rendering the debt dischargeable. The court concluded that the policy of promoting tax collection would not be furthered if subrogation was permitted, reasoning that the state had been paid by the surety, irregardless of the status of the surety's claim against the debtor. Id; See also In re Smothers, 60 B.R. 733, 735 (Bankr. W.D. Ky. 1986).

The Court in Trahan, 624 F.2d at 908, specifically rejected the analysis provide earlier in Gilbert v. United States Fidelity and Guaranty Co., 180 F. Supp. 794 (M.D. Ga. 1959), aff'd, 274 F.2d 823 (5th Cir. 1960). In Gilbert, 180 F. Supp 794, the guarantor, pursuant to a surety agreement, paid a Georgia state tax, which the principal had failed to pay. The principal was subsequently adjudicated bankrupt and discharged. The principal contended that enforcement of liability to the guarantor was barred as a result of the discharge. The court reasoned that pursuant to a

Georgia subrogation statute, it was as if the taxes remained unpaid and still due, rendering the debt nondischargeable under the Bankruptcy Act. Id. at 796.

The line of reasoning set forth in Gilbert, 180 F. Supp. 794, was later adopted by the Eleventh Circuit in In the matter of Waite, 698 F.2d 1177 (11th Cir. 1983). A similar situation involving payment by the surety of an alcoholic beverage tax arose in Waite. The court reasoned that if the tax had gone unpaid, the state would have been vested with a right to prevent discharge of the tax debt, and consequently, the surety should be subrogated to this right. In In re Hancock, 36 B.R. 709 (Bankr. S.D. Ill. 1984) the court also concluded that a debt which is owed a surety under a bond providing for payment of a state sales tax was nondischargeable. The court appears to have followed the holding in Gilbert, 180 F. Supp. 794, noting that "the policy considerations underlying the nondischargeability provisions of the Bankruptcy Act remain unchanged in the Bankruptcy Code." Hancock, 36 B.R. at 710.

Subrogation, by its nature, is an equitable right, dependent on the circumstances in a particular instance

for its application. In re Co-Build Companies, Inc., 21 B.R. 635 (Bankr. E. D. Pa. 1982); In re Alloway, 37 B.R. 420, 423 (Bankr. E.D. Pa.1984). The principal of subrogation is well recognized in Texas. In Crimmins v. Lowry, 691 S.W. 2d 582, 585 (Tex. 1985) the Texas Supreme Court stated that this equitable right springs from the surety's promise to pay a debt of the principal, permitting the surety to bring an action against the principal on the debt.

It appears to this court that the majority of cited authority holds that a surety which pays a tax debt steps into the shoes of the taxing authority to claim nondischargeability status.[1] See In re Caffrey, 77 B.R. 219, 221 (Bankr. W.D. Mo. 1987); In re Woerner, 19 B.R. 708, 712 (Bankr. Kan. 1982); In the matter of Waite, 698 F.2d 1177; Thomas International Corp. v. Morris International Corp. v. Morris (In re Morris), 31 B.R. 474 (Bankr. N.D. Ill. 1983). In In re Cooper, 83

---

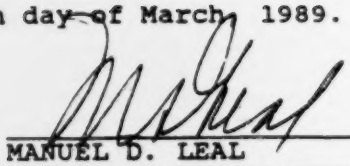
[1]Although this court rules in accordance with the majority of authority, it notes the weakness of the logic employed in these cases. The purchase of the surety bond constituted contractual payment for protection. Whereas the relationship between Hartford and Fields was contractual, the relationship between Hartford and the taxing authority was not.

B.R. 544, 548 (Bankr. C.D. Ill. 1988) the court apparently viewed the position of the Eleventh Circuit in Trahan to go beyond the parameters of the Bankruptcy Code. The court concluded that:

> [w]hile the court is aware of the rule that that [sic.] the nondischargeability provisions are to be read liberally in favor of a debtor's fresh start, to read section 523(a)(1) to be limited to debts actually owed to the tax collector or those obligations actually entitled to priority under section 507(a)(7) of the Code would be to read into the statute language that is simply not there.
> Id. See also, In re Woerner, 19 B.R. at 712 (Code does not expressly preclude nondischargeability of subrogated claim).

Hartford appears to this court to have shouldered its burden of proof regarding the nondischargeability status of its claim. Having paid the beverage tax on behalf of Fields, Hartford is to be provided the opportunity to seek reimbursement. The motion to dismiss the complaint is denied and Hartford's claim is determined to be nondischargeable. Hartford is awarded attorneys fees and costs.

Signed this the 15th day of March, 1989.



MANUEL D. LEAL
UNITED STATES BANKRUPTCY JUDGE

time, Crawford tipped his shoulder and reached further down.

Under these circumstances, a reasonable officer could well fear for his safety and that of others nearby. He could reasonably believe that Crawford had retrieved a gun and was about to shoot. That is, an officer would have probable cause to believe that "the suspect pose[d] a threat of serious physical harm." *Garner*, 471 U.S. at 11, 105 S.Ct. at 1701. Anderson had repeatedly warned Crawford to raise his hands and was now faced with a situation in which another warning could (it appeared at the time) cost the life of Anderson or another officer. Under such circumstances, an officer is justified in using deadly force to defend himself and others around him. Accordingly, the individual defendants are entitled to summary judgment as a matter of law.

The fact that the vehicle was "totally surrounded" by police does not change matters; had Crawford in fact retrieved a gun from beneath his seat, he could have caused injury or death despite the presence of numerous police officers. Also irrelevant is the fact that Crawford was actually unarmed. Anderson did not and could not have known this. The sad truth is that Crawford's actions alone could cause a reasonable officer to fear imminent and serious physical harm.[8]

Conclusion

Since the individual defendants are entitled to summary judgment, we must reverse the district court's denial of their motion. In addition, since no federal claims remain against the individual defendants, we instruct the district court to dismiss the pendent state claims against those defendants as well, without prejudice to refiling those claims in state court.[9]

A case of this gravity demands the utmost care. Here, for reasons neither explained nor evident, there was a complete failure to provide the evidence required in response to a summary judgment motion. The rules in this regard are clear and well-established; we are without authority to waive them.

For the reasons stated above, we REVERSE the district court's denial of summary judgment for the individual defendants; DISMISS the appeal of the City of Waco; and REMAND for entry of summary judgment in favor of the individual defendants, dismissal without prejudice of pendent state claims against the individuals, and further proceedings consistent with this opinion.

In the Matter of Herbert W. FIELDS, Jr., Debtor.

HARTFORD CASUALTY INSURANCE COMPANY, Appellee,

v.

Herbert W. FIELDS, Jr., Appellant.

No. 90-2735
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

March 21, 1991.

Surety which had paid Chapter 7 debtor's gross receipts taxes levied by Texas

8. The Supreme Court's decision in *Garner* is not to the contrary. There, the Court found unreasonable the shooting of an unarmed felony suspect, but the officer could see that the suspect's hands were empty and was "reasonably sure" he was unarmed; further, the suspect was fleeing, not reaching for an unknown object in repeated defiance of an order to raise his hands. *See* 471 U.S. at 1, 105 S.Ct. at 1694. In *Garner*, it was evident that the suspect posed "no immediate threat to the officer and no threat to others." *Id.* at 11, 105 S.Ct. at 1701. Here, all signs were to the contrary.

9. Such dismissal is perhaps the practice in this circuit, *see, e.g., McKee*, 877 F.2d at 416; *Jacquez*, 801 F.2d at 793, although there is disagreement as to whether it is mandatory, *see McKee*, 877 F.2d at 426 (dissenting in part); *Mintz v. Barthelemy*, 722 F.Supp. 273, 282 & n. 16 (E.D. La.), *aff'd*, 891 F.2d 520 (5th Cir.1989).

Alcoholic Beverages Commission filed complaint to determine dischargeability of debt. The United States Bankruptcy Court for the Southern District of Texas determined that surety's claim was nondischargeable, and debtor appealed. The District Court, Norman W. Black, J., affirmed, and debtor appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that surety, having paid debtor's taxes to Commission, became subrogated to state of Texas' right to exception from discharge.

Affirmed.

1. Bankruptcy ⇐3352

Gross receipts tax liability under Texas law for licensees and permittees of mixed beverages are nondischargeable in bankruptcy cases of such licensees and permittees. Bankr.Code, 11 U.S.C.A. § 523(a)(1)(A); V.T.C.A., Alcoholic Beverage Code § 204.01.

2. Bankruptcy ⇐3420(1)

Party seeking exception to discharge bears burden of proof as to nondischargeability.

3. Bankruptcy ⇐3385

Surety, having paid debtor's gross receipts taxes levied by Texas Alcoholic Beverages Commission, became subrogated to all rights that state of Texas had against debtor under Bankruptcy Code, including state's right to exception from discharge for tax liability. Bankr.Code, 11 U.S.C.A. § 523(a)(1)(A); V.T.C.A., Alcoholic Beverage Code § 204.01.

Michael J. Pledger, Houston, Tex., for appellant.

Gary L. Wickert, Houston, Tex., for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The debtor, Herbert W. Fields ("Debtor"), appeals from the district court's refusal to discharge a certain debt to his surety, Hartford Casualty Insurance Co. ("Hartford"), incurred when Hartford paid taxes on his behalf to the State of Texas. The issue presented by this case is whether Hartford can be subrogated to the State of Texas' right to an exception from discharge under 11 U.S.C. § 523(a)(1)(A)[1] of the Bankruptcy Code. Holding that Hartford is entitled to subrogation, we affirm.

I

The facts are brief and uncontested. Hartford issued a surety bond covering a mixed beverage permit to Debtor as the owner of two corporations known as Corky's Country and Carlos' 'N Charlies Del Norte, Inc.[2] The surety agreement bound Debtor as principal and Hartford as surety to the rights of the State of Texas for payment of all fees, taxes and penalties levied by the Texas Alcoholic Beverages Commission ("TABC").

Debtor filed for bankruptcy protection in late December 1984. Subsequently, during the periods of December 28, 1984 to October 16, 1985, and February 19, 1985 to October 2, 1985, Debtor failed to pay taxes covered by the surety bonds. Pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State on November 21, 1985.

1. Section 523(a)(1)(A) of the Bankruptcy Code provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does to discharge an individual Debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and of the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

2. Texas Alcoholic Beverage Code § 204.01 (Vernon 1978 & 1991 Supp.) requires licensees and permittees of mixed beverages to furnish a bond to secure the payment of the gross receipts tax.

II

On December 28, 1984, Debtor filed his Chapter 11 bankruptcy petition and properly scheduled Hartford as a creditor. The case was converted to a Chapter 7 case on October 29, 1986. The Chapter 7 Creditor's Meeting was noticed and held on December 16, 1986, and the deadline for filing complaints to determine dischargeability under 11 U.S.C. 523(c) was established as February 16, 1987. Hartford failed to file a Complaint to Determine Dischargeability of Debt until February 9, 1988, nearly one year after the bar date. Debtor filed his Motion to Dismiss Complaint on March 9, 1988.

The Bankruptcy Court denied Debtor's motion, determining that Hartford's claim was nondischargeable under 11 U.S.C. § 523(a)(1)(A). Debtor appealed to the district court on the grounds that the debt was not automatically nondischargeable as taxes and that under any other theory Hartford's Complaint was not timely filed. The district court, however, affirmed the Bankruptcy Court's decision. Debtor timely appeals.

III

[1, 2] Initially, we note that if there had been no surety arrangement in this case and the claim was asserted by the State of Texas rather than Hartford, the debt would be nondischargeable under 11 U.S.C. § 523(a)(1)(A).[3] We must decide, however, whether a surety who pays a tax debt of another is subrogated to the State's right to an exception from discharge. As with all such claims, the party seeking an exception to discharge bears the burden of proof as to nondischargeability. *In re Benich*, 811 F.2d 943 (5th Cir.1987).

Debtor argues that the debt due Hartford arose as a result of an indemnity agreement, rather than as a tax. The tax exception, according to Debtor, was promulgated to facilitate tax collection and because Hartford is not a taxing authority, this policy concern is not promoted by rendering Hartford's claim nondischargeable. Similarly, there is no need to protect the surety, argues the Debtor, as the fees charged by Hartford for the issuance of surety bonds are designed to protect Hartford against losses. Debtor concludes that because Hartford is not a taxing authority, it has no right to levy taxes and is not entitled to nondischargeability status under 11 U.S.C. § 523(a)(1)(A). We are unpersuaded.

We last confronted this issue over thirty years ago in *Gilbert v. United States Fidelity & Guaranty Co.*, 180 F.Supp. 794 (M.D.Ga.1959), *aff'd per curiam*, 274 F.2d 823 (5th Cir.1960). *Gilbert* is similar to the case at bar. Pursuant to a surety agreement, USF & G paid taxes due the State of Georgia that Gilbert had failed to pay. After Gilbert was adjudicated bankrupt, he sought a determination that the debt owed the surety was discharged in his bankruptcy. The district court, however, held that the surety benefitted from a Georgia subrogation statute, and the taxes were treated as still due for the benefit of the surety. *Gilbert*, 180 F.Supp. at 796. We affirmed the holding that under the Bankruptcy Act, a surety who pays a debtor's tax liability is subrogated to the taxing authority's status to prevent the discharge of a claim for unpaid taxes. 274 F.2d at 823.

[3] *Gilbert* was decided, however, under the old Bankruptcy Act. Debtor argues that the adoption of the new Bankruptcy Code permits us to reexamine this issue and, if warranted, to disregard *Gilbert*. We acknowledge that if the Bankruptcy Code created a substantive departure from the Bankruptcy Act on the issue of a surety subrogation to tax debts, we would be released, at least to a degree,

3. It is uncontested that the taxes in question in this case are nondischargeable pursuant to § 507(a)(7). Section 507(a)(7), concerning priority of claims, lists a number of taxes including a "tax required to be collected or withheld and for which the debtor is liable in whatever capacity." The legislative history reveals that this category of taxes "includes excise taxes which a seller of goods is required to collect from a buyer and pay over to a taxing authority." S.Rep. No. 989, 95th Cong., 2d Sess. 71, *reprinted in* 1978 U.S.Code Cong. & Ad.News 5787, 5857.

from the precedential restraint of *Gilbert*. We believe that the adoption of the Bankruptcy Code, however, did not alter in any significant way, the bankruptcy law with respect to this issue.[4] We are therefore bound by our previous decision in *Gilbert*. *See Ford v. United States*, 618 F.2d 357, 361 (5th Cir.1980). As stated in *Gilbert*, "it is as if the taxes themselves have not been paid and are still due and, of course, are not dischargeable in bankruptcy." 180 F.Supp. at 796. Accordingly, we hold that Hartford, having paid Debtor's taxes to the TABC, is subrogated to all the rights that the State of Texas had against Debtor under the Bankruptcy Code.[5]

The Eleventh Circuit has also concluded that our holding in *Gilbert* survives the adoption of the Bankruptcy Code. In *In re Waite*, 698 F.2d 1177 (11th Cir.1983), the surety made an identical claim as Hartford. The surety argued that it was entitled to be subrogated to the rights and standing of the State of Tennessee to assert nondischargeability under 11 U.S.C. § 523(a)(1)(A) for unpaid liquor sales taxes of the kinds specified by 11 U.S.C. § 507(a)(6).[6] The Eleventh Circuit agreed, holding specifically that *Gilbert* survived the enactment of the Bankruptcy Code.[7] The *Waite* court reasoned that:

> While *Gilbert* concerned the old Bankruptcy Act, the new Bankruptcy Code does not furnish a principled basis for distinguishing this case. Neither statute expressly indicates whether the nondischargeability of tax debts extends to debts owed to a surety which has paid the Debtor's tax debts.

698 F.2d at 1178. We note that the majority of courts that have addressed this issue have likewise held that a surety is entitled to subrogation under § 523(a)(1)(A).[8]

4. Specifically, the Bankruptcy Act provided that a "discharge in bankruptcy shall release a bankrupt from ... all of his provable debts ... except such as (1) are due as a tax ..." 11 U.S.C. § 35 (1964) (repealed). Section 523(a)(1) of the Bankruptcy Code states that a "discharge ... does not discharge an individual debtor from any debt for a tax...."

5. *Gilbert* relied on a Georgia law that permitted subrogation. Similarly, we note that the principle of subrogation is well recognized in Texas. Texas law provides that a surety "is subrogated to all of the judgment creditor's rights." Tex. Bus. & Comm.Code Ann. § 34.04 (Vernon 1990). The Texas Supreme Court has also held that a surety is subrogated to all of the rights of the original creditor:

> Because the surety promises to pay the debt of another, equity confers the right of subrogation. If the surety or party in the position of a surety pays the debt of the principal, the surety is subrogated to all of the rights, remedies, equities, and securities of the creditor.

Crimmins v. Lowry, 691 S.W.2d 582, 585 (Tex. 1985).

6. Now 507(a)(7), renumbered 1984.

7. Because decisions of the Fifth Circuit that were decided on or before September 20, 1981, are binding on the Eleventh Circuit, the *Waite* court necessarily had to address the same issue with respect to the precedential effects of *Gilbert*. *See, e.g., Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

8. *See, e.g., In re Norris*, 107 B.R. 592 (E.D.Tenn. 1989); *In re Trasks' Charolais*, 84 B.R. 646 (D.S.D.1988); *In re Cooper*, 83 B.R. 544 (C.D.Ill. 1988); *In re Zoglman*, 78 B.R. 213 (W.D.Wis. 1987); *In re Caffrey*, 77 B.R. 219 (W.D.Mo.1987); *In re Morris*, 31 B.R. 474 (N.D.Ill.1983); *In re Alloway*, 37 B.R. 420 (E.D.Pa.1984); *In re Hancock*, 36 B.R. 709 (S.D.Ill.1984); *In re Woerner*, 19 B.R. 708 (D.Kan.1982); *In re Gibbs*, 11 B.R. 320 (W.D.Mo.1981).

The Ninth Circuit is the one notable exception to this majority. *See, e.g., National Collection Agency, Inc. v. Trahan*, 624 F.2d 906 (9th Cir. 1980). The *Trahan* court expressly refused to follow our decision in *Gilbert*. 624 F.2d at 907–08. The court emphasized a general policy of the Bankruptcy Code was to grant debtors a fresh start. Nevertheless, it recognized an exception to this policy for taxes because of the "overriding need to assure tax collection by government entities." *Id.* at 907. The court reasoned that permitting a surety to assert the rights of the State would not promote the collection of taxes, and would actually run contrary to the policy of providing debtors a fresh start. *Id.* As a result, the *Trahan* court held that California surety law conflicted with federal bankruptcy law. *Id.*

We disagree. Because Texas required the bond specifically to secure payment of the taxes, we think the debt paid by the surety is a tax "of the kind" specified in § 506(a)(7). Furthermore, we do not see how the *Gilbert* holding interferes with the fresh start contemplated for debtors by the Code:

> [a] debtor's fresh start is not overburdened by excepting a surety's subrogation claim from discharge. The debtor's fresh start is the same; he owes the same amount of nondischargeable tax debt; the only difference is whether the debtor owes the debt to the government or the surety.

IV

Because Hartford has met its burden of proving that it is entitled to be subrogated to the nondischargeability rights of the State of Texas, the decision of the district court is

AFFIRMED.

Stella HULL, Plaintiff-Appellant,

v.

CUYAHOGA VALLEY JOINT VOCATIONAL SCHOOL DISTRICT BOARD OF EDUCATION, et al., Defendants-Appellees.

No. 90-3360.

United States Court of Appeals, Sixth Circuit.

Argued Jan. 23, 1991.

Decided Feb. 15, 1991.

Nontenured black female teacher brought civil rights action against school board, superintendent, executive director, and school administrator after she was nonrenewed. The United States District Court for the Northern District of Ohio, John J. Manos, J., granted defendants' motion for summary judgment. Employee appealed. The Court of Appeals, Contie, Senior Circuit Judge, held that: (1) nonrenewal of contract did not give rise to action under § 1981; (2) defendants were not two separate "people" to form conspiracy; (3) district court erred in applying two-year statute of limitations to all but discriminatory discharge claims; and (4) evidence did not support actions against individual defendants or board.

Affirmed in part, and reversed and remanded in part.

In re Norris, 107 B.R. 592, 596 (E.D.Tenn.1989).

1. Civil Rights ⇐144

Nonrenewal of black female employee's contract did not impede employee's right to "make or enforce" contracts and thus was not cognizable under § 1981. 42 U.S.C.A. § 1981; Ohio R.C. §§ 3319.11, 3319.11(E).

2. Conspiracy ⇐2

As general rule, corporation cannot conspire with its own agents or employees.

3. Conspiracy ⇐7.5

School district superintendent, executive director of district, and school administrator were not two separate "people" so as to be able to form conspiracy, and thus could not be found to have conspired to violate civil rights statute; all three were employees or agents of school board, and thus all were members of same collective entity. 42 U.S.C.A. § 1985(2, 3).

4. Civil Rights ⇐210

Under Ohio law, applicable limitations period for § 1983 claims is two-year limitations period for actions involving bodily injury or injury to personal property. Ohio R.C. § 2305.10; 42 U.S.C.A. § 1983.

5. Limitation of Actions ⇐58(1)

"Continuing violation" theory applied to render § 1983 claims by nontenured black female teacher timely; teacher alleged discriminatory working conditions throughout term of her employment which were related to her discharge, and, prior to events surrounding her discharge, teacher was not warranted in filing race discrimination suit. Ohio R.C. §§ 2305.09(D), 2305.10; 42 U.S.C.A. § 1983.

6. Civil Rights ⇐192, 196

To establish personal liability of individual defendants under § 1983, plaintiff was required to show that they deprived her of federal right while acting under color of state law. 42 U.S.C.A. § 1983.

7. Civil Rights ⇐240(2)

Superintendent's racial animus towards nontenured black female teacher